COMPLY, MDLOUT , MEDIATION, TRLSET

U.S. District Court
Middle District of Florida (Orlando)
CIVIL DOCKET FOR CASE #: 6:05-cv-00667-GAP-DAB

Hall v. Pfizer, Inc.
Assigned to: Judge Gregory A. Presnell
Referred to: Magistrate Judge David A. Baker
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 05/04/2005
Date Terminated: 05/18/2006
Jury Demand: None
Nature of Suit: 365 Personal Inj. Prod. Liability
Jurisdiction: Diversity

Date Filed	#	Docket Text
05/18/2006	28	MULTIDISTRICT LITIGATION panel order transferring case to: District of Minnesota. MDL case number: 1724 (RDO) (Entered: 08/15/2006)
05/05/2006	27	MDL Conditional Transfer ORDER. (RDO) (Entered: 05/18/2006)
07/27/2005	26	ORDER advising John Edgar Booth, Rainey C. Booth, Joshua Brockman and Zoe B. Littlepage that the court will no longer mail orders in this case OR accept any paper filings by these attorneys for failure to comply with the Court's prior orders regarding CM/ECF (Doc. No. 5). Counsel are admonished accordingly. re 21 Response to Order to Show Cause filed by David Hall,, 16 Order to show cause, filed by David Hall. Signed by Judge Gregory A. Presnell on 7/27/2005. (Copy to be mailed and then counsel will receive no further orders from the court)(AKJ,) (Entered: 07/28/2005)
07/26/2005	25	ORDER REFERRING CASE to mediation. Lead counsel John Booth to coordinate dates. Mediation shall be conducted on or before 8/31/06.Signed by Judge Gregory A. Presnell on 7/26/05. (RDO) (Entered: 07/27/2005)
07/26/2005	24	CASE MANAGEMENT AND SCHEDULING ORDER.Signed by Judge Gregory A. Presnell on 7/26/2005. (TKW,) (Entered: 07/26/2005)
07/25/2005	23	ENDORSED ORDER denying 17 Motion to bifurcate . Signed by Judge Gregory A. Presnell on 7/25/2005. (TKW,) (Entered: 07/25/2005)
07/20/2005	22	RESPONSE in opposition re 17 MOTION to bifurcate pretrial discovery filed by David Hall. (RDO) (Entered: 07/20/2005)
07/20/2005	21	SHOWING OF GOOD CAUSE/RESPONSE TO ORDER TO SHOW CAUSE 16 by David Hall. (RDO) (Entered: 07/20/2005)
07/12/2005	20	ENDORSED ORDER granting 19 Motion to extend time; response to show cause order due 7/18/05. Signed by Judge Gregory A. Presnell on 7/12/2005. (TKW,) (Entered: 07/12/2005)

EXHIBIT 4

07/11/2005	19	MOTION to extend time to show cause by David Hall. (RDO) (Entered: 07/11/2005)
06/28/2005	18	CASE MANAGEMENT REPORT. (Gerecke, Edward) (Entered: 06/28/2005)
06/28/2005	17	MOTION to bifurcate *pretrial discovery* by Pfizer, Inc.. (Gerecke, Edward) (Entered: 06/28/2005)
06/27/2005	16	ORDER TO SHOW CAUSE as to counsel for the Plaintiff David Hall. On 5-5-05 the court issued a Notice to Comply with CM/ECF (Doc. No. 5) giving all counsel who were not yet registered 30 days in which to comply. John Edgar Booth, Rainey C. Booth, Joshua Brockman and Zoe B. Littlepage all failed to respond or comply with the Court's prior order. Response due within 11 days.Signed by Judge Gregory A. Presnell on 6/27/2005. (copies mailed/emailed)(AKJ,) (Entered: 06/28/2005)
05/27/2005	15	ENDORSED ORDER granting 13 motion to appear pro hac vice, granting 14 motion to appear pro hac vice. Provided counsel shall participate in the electronic filing system as adopted by the Court. Copies of docket entries will not be sent by U.S. Mail. Signed by Judge David A. Baker on 5/27/2005. (Baker, David) (Entered: 05/27/2005)
05/25/2005		PRO HAC VICE FEES paid & Special Admission Attorney Certification Form filed by Steven Glickstein on behalf of Pfizer, Inc. (Filing fee $10.00; receipt number 18455) re: 14 motion for pro hac vice (IGC) (Entered: 05/26/2005)
05/23/2005		PRO HAC VICE FEES paid & Special Admission Attorney Certification Form filed by Lori B. Leskin on behalf of Pfizer, Inc. (Filing fee $10.00; receipt number 18428) re 13 motion pro hac vice (IGC) (Entered: 05/26/2005)
05/23/2005	14	MOTION to appear pro hac vice by Steven Glickstein on behalf of Pfizer, Inc. (Receipt #18455) (RDO) (Entered: 05/26/2005)
05/23/2005	13	MOTION to appear pro hac vice by Lori B. Leskin on behalf of Pfizer, Inc. (RDO) (Entered: 05/26/2005)
05/20/2005	12	ENDORSED ORDER granting 11 Motion to conduct CMC by telephone . Signed by Judge Gregory A. Presnell on 5/20/2005. (Presnell, Gregory) (Entered: 05/20/2005)
05/19/2005	11	MOTION to permit appearance by telephone at initial case management meeting/conference by Pfizer, Inc.. (Gerecke, Edward) (Entered: 05/19/2005)
05/19/2005	10	CERTIFICATE of interested persons and corporate disclosure statement re 4 Interested persons order by David Hall. (RDO) (Entered: 05/19/2005)
05/19/2005	9	NOTICE of pendency of other actions re 3 order of compliance to Local Rule 1.04(c) by David Hall. Related cases: no (RDO) (Entered: 05/19/2005)

05/06/2005	8	CERTIFICATE of interested persons and corporate disclosure statement by Pfizer, Inc.. (Gerecke, Edward) (Entered: 05/06/2005)
05/06/2005	7	NOTICE of pendency of other actions re order of compliance to Local Rule by Pfizer, Inc. Related case(s): n (Gerecke, Edward) (Entered: 05/06/2005)
05/06/2005	6	ANSWER to complaint with Jury Demand by Pfizer, Inc..(Gerecke, Edward) (Entered: 05/06/2005)
05/05/2005	5	ORDER to comply with the administrative procedures regarding electronic filing. Counsel who are not yet using the system (John Edgar Booth, Rainey C. Booth, Joshua Brockman & Zoe B. Littlepage) have 30 days in which to register with the court for a login/password, take the tutorials on the court's website OR classes offered by the clerk's office and begin using the system.Signed by Judge Gregory A. Presnell on 5/5/2005. (Counsel mailed/emailed)(AKJ,) (Entered: 05/05/2005)
05/05/2005	4	INTERESTED PERSONS ORDER - Certificate of interested persons and corporate disclosure statement due by 5/16/2005.Signed by Judge Gregory A. Presnell on 5/5/2005. (counsel mailed/emailed)(AKJ,) (Entered: 05/05/2005)
05/05/2005	3	RELATED CASE ORDER AND NOTICE of designation under Local Rule 3.05 - track 2. Notice of pendency of other actions due within 11 days. Signed by Judge Gregory A. Presnell on 5/5/2005. (counsel mailed/emailed)(AKJ,) (Entered: 05/05/2005)
05/04/2005	2	COMPLAINT pursuant to a Personal Injury claim between diverse parties. (Originally filed in State Court on 3/1/05 as case no. 05-CA-1814) (RDO) (Entered: 05/05/2005)
05/04/2005	1	NOTICE OF REMOVAL from Orange County Court, case number 05-CA-1814, filed in State Court on 3/1/05. Filing fee $ 250 - receipt number 18214filed by Pfizer, Inc..(RDO) (Entered: 05/05/2005)

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID HALL,

Plaintiff,

v. Civil Action No. 6:05-cv-667-Orl-31DAB

PFIZER, INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO BIFURCATE PRETRIAL DISCOVERY

Defendant Pfizer Inc. (hereinafter "Pfizer") moves the Court to bifurcate pretrial proceedings. Pfizer requests that the first stage of discovery be limited to issues relating to general causation – including early disclosure of expert witnesses and a *Daubert* hearing to resolve defense challenges to those experts. Given the lack of science supporting plaintiff's claims that Viagra® caused his vision loss, early resolution of the issue of general causation, while staying extensive fact discovery regarding other elements of plaintiff's case, will prevent the waste of time and effort of the parties and the Court, and would allow the most efficient use of judicial resources.

MEMORANDUM IN SUPPORT OF MOTION TO BIFURCATE

I. Procedural History of this Action

A. Plaintiff's Prior "New York Action"

This action is not new. On October 8, 2002, plaintiff, David Hall, along with a co-plaintiff, filed a product liability action against Pfizer in a New York state court (hereinafter the "New York Action") alleging Viagra® caused his loss of vision. The New York Action was

ultimately dismissed on the grounds of forum non conveniens in favor of plaintiff Hall filing his action in Florida. Plaintiff has now done so.

Before the dismissal of the New York Action, extensive discovery had taken place. Pfizer collected plaintiff's medical records and took the depositions of plaintiff, his wife, and his treating physicians (Drs. Beneke and Haas). Unless plaintiff identifies new physicians or other witnesses, Pfizer needs no further discovery from plaintiffs other than updated medical records, which plaintiff has committed to produce.

In addition to the discovery conducted by Pfizer of plaintiff, plaintiff conducted discovery of Pfizer during the pendency of the New York Action. Pfizer answered plaintiff's two sets of Interrogatories and responded to plaintiff's First and Second Requests for the Production of Documents (hereinafter the "Requests for Documents"). In response to plaintiff's Requests for Documents, and pursuant to a Confidentiality Order, Pfizer made available for review and copying in excess of 132,000 pages of responsive documents. These documents are directly germane to the threshold issue of general causation—*i.e.*, whether Viagra® can cause non-arteritic anterior ischemic optic neuropathy (hereinafter "NAION"), the condition experienced by Mr. Hall. The documents made available to, and copied by, plaintiff include:

- The Investigational New Drug Application ("IND") for Viagra®, which includes the pre-clinical pharmacology and toxicology investigations, including studies in animals, as well as early clinical trials. The IND files provided cover the time period December 17, 1994 through March 31, 2004, and consist of 38 boxes of materials;

- The New Drug Application ("NDA") for Viagra®, which includes Phase I clinical pharmacology trials and Phase II/III clinical trials designed to assess the efficacy and safety of sildenafil in the treatment of erectile dysfunction. These clinical investigations included, but are not limited to, pharmacokinetics (e.g., metabolism, elimination, bioequivalence), cardiovascular effects (blood pressure, heart rate, central hemodynamics and peripheral blood vessels, platelet aggregation and bleeding time), visual function effects, sperm function effects, drug interactions, and statistical analyses of safety and efficacy. The complete NDA files also include the advertising and promotional materials

developed and distributed for Viagra® to health care professionals. The NDA files provided cover the time period August 29, 1997 through December 15, 2003, and consist of 39 boxes of material;

- The Viagra® Periodic Safety Update Reports (provided quarterly for the first 2 years after approval) which summarize all adverse events reports submitted to Pfizer regarding Viagra®. Pfizer has made these reports available for inspection from the time Viagra® was first approved for sale in the United States, through March 2003. This represents a total of 14 Reports;

- Pfizer's file of correspondence with the FDA (the "FIO file"), covering the time period of July 8, 1996 through November 18, 2003, and consisting of 2 boxes of materials;

- The FDA's Joint Clinical Review of the NDA dated January 8, 1998, which includes the agency's analysis of Viagra®'s safety and efficacy;

- Copies of the FDA-approved package inserts for Viagra®;

- A May 1998 letter from Pfizer to emergency physicians and other emergency personnel; and

- Copies of prior depositions of Pfizer witnesses.

These documents include Pfizer's extensive testing of Viagra®, as well as adverse events reported to the company relating to the drug. Pursuant to the Order dismissing the New York Action on forum non conveniens grounds, "all discovery taken to date [in the New York Action] may be used in" the now-pending Florida action. *See Grant v. Pfizer Inc.*, 122164/02, at 6 (Sup. Ct. New York Cty. Oct. 14, 2004).

B. Other Pending Viagra® Matters

Plaintiff's counsel in this action are also representing another plaintiff, who also alleges a visual injury resulting from his ingestion of Viagra®, in a case pending in the District of New Jersey (Camden Vicarage) (Simandle, J). In that litigation, Pfizer – in addition to making the documents produced in the New York Action available for use in that action – Pfizer has produced additional documents, including:

- Documents relating to advisory panels established by Pfizer for the purpose of evaluating data on visual effects of Viagra®;
- Training modules developed for Pfizer sales representatives relating to Viagra®;
- Information regarding physician inquiries to Pfizer regarding Viagra®;
- Press releases relating to Viagra® issued by Pfizer; and
- Approximately 70 boxes of study reports for clinical studies conducted by Pfizer on Viagra®.

Assuming entry of a similar Confidentiality Order in this action as entered in the New Jersey action, these same documents are available for use in this litigation.

Beyond these documents, the New Jersey court has, to date, directed that additional discovery of Pfizer be targeted to matters relevant to general causation and has indicated that, upon the completion of such focused discovery, plaintiff should be prepared to provide expert reports, consistent with Rule 26, on the issue of general causation.

C. The Lack of Scientific Evidence Establishing General Causation

There is no dispute that, absent a showing that plaintiff can provide admissible expert evidence demonstrating that Viagra® is capable of causing NAION, all other discovery becomes moot. In fact, there is a complete lack of scientific evidence supporting a causal connection between Viagra® and NAION. Thus, to allow further fact discovery before the sufficiency of plaintiff's expert's opinions can be assessed under the standards announced in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny, would require Pfizer to undertake an unnecessary and massive document collection effort, thereby imposing an enormous, and needless, burden on Pfizer in terms of cost, time and resources. To prevent such inefficiencies, Pfizer respectfully requests that this Court bifurcate pretrial discovery and order early disclosure

of expert reports while staying further fact discovery pending resolution of the threshold issue of general causation.

While Pfizer does not expect the Court to decide the *Daubert* issue at this time, the following summary is provided to justify the need for early expert disclosure and a stay of further fact discovery. In this case, plaintiff alleges that his ingestion of Viagra® caused him to develop "blindness [and] loss of vision" and to suffer NAION, a condition that causes acute, painless vision loss. NAION is the most common acute optic nerve disease in adults over 50 years of age. NAION shares a number of common risk factors for erectile dysfunction, including age over 50, hypertension, diabetes, high cholesterol and cardiovascular disease. Because the population of men at risk for NAION overlaps with those at risk for erectile dysfunction, it is to be expected that some men who take Viagra®—*i.e.*, men with erectile dysfunction— will also develop NAION.

Viagra® was approved by the FDA in March 1998 as the first oral medication for the treatment of male erectile dysfunction. Both before and since Viagra®'s approval, Pfizer has conducted extensive clinical studies. There have been no reports of NAION or any other similar event in these studies. Medical studies published since Viagra® has been on the market confirm the safety of the drug. In 2001, researchers from the Scheie Eye Institute in the University of Pennsylvania concluded that Viagra® caused "no significant change in intraocular pressure . . . or optic nerve blood flow." None of the 15 subjects studied reported an adverse event. Grunwald JE, et al., *Effect of Sildenafil Citrate (Viagra) on the Ocular Circulation*, 131(6) Am. J. Ophthalmol. 751-55 (June 2001). In 1999, at the meeting of the American Ophthalmological Society, researchers reported that although there were a "scattering of visual reports" related to Viagra®, the "lack of either pattern or concentration of finding [was] reassuring." The

researchers concluded that "for a clear signal to emerge, it must overcome the 'noise' of expected incidence in the absence of the drug ingestion. *At present no such clear signal of serious pathology from [Viagra®] has emerged.*" Laties AM, Fraunfelder FT, *Ocular Safety of Viagra (sildenafil citrate)*, 97 Tr. Am. Ophth. Soc. 115-128 (1999) (emphasis added). Other published scientific literature on Viagra® is to the same effect.

In sum, there have been no published clinical or epidemiological studies concluding that Viagra® can cause NAION, or that men who take Viagra® suffer NAION at a greater rate than men with the same demographic characteristics who don't. Given the current state of scientific evidence, there is simply no scientific evidence to support any expert opinion asserting a causal connection between Viagra® and NAION. Plaintiff should be required to present whatever evidence they may have before requiring the parties and the Court to engage in lengthy and expensive discovery.

II. Argument

A. Courts Have Required Early Disclosure of Expert Reports

Federal Rule of Civil Procedure 26 "vests the trial judge with broad discretion to tailor discovery narrowly." *Crawford-El v. Britton*, 118 S. Ct. 1584, 1597 (1998). Specifically, subsection (b)(2) provides the Court with the tools necessary to "control excessive discovery." F.R.C.P. 26, *Comments to 2000 Amendments*. Under these provisions, the Court may limit discovery "if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case . . . and the importance of the proposed discovery in resolving the issues." F.R.C.P. 26(b)(2); *see also* F.R.C.P. 26(d) (permitting a court to "issue an order prescribing the sequence of discovery").

The court's discretion to dictate the order of discovery has led courts in certain circumstances to require plaintiffs' disclosure of experts relatively early in the discovery process. In *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct., Law Div. 1986), the court issued a case management order early in the litigation directing the plaintiffs to provide, among other things, reports of medical experts supporting the claims of injury and causation. In dismissing the claims of non-compliant plaintiffs, the court explained that "it is time that prior to the institution of such a cause of action, attorneys for plaintiffs must be prepared to substantiate, to a reasonable degree, the allegations of personal injury . . . and proximate cause." *Id.* at *4. Given the expense involved in defending the case, the court was simply "not willing to continue the instant action with the hope that the defendants eventually will capitulate and give a sum of money to satisfy plaintiffs and their attorney without having been put to the test of proving their cause of action." *Id. See also Acuna v. Brown & Root*, 200 F.3d 335 (5th Cir. 2000) (sustaining trial court's use of a *Lone Pine* order requiring plaintiffs to specify in affidavits the injuries allegedly suffered and the scientific means by which the harm was allegedly done); *Claar v. Burlington*, 29 F.3d 499 (9th Cir. 1994) (affirming summary judgment based upon expert affidavits describing the scientific basis for the causal connection between the exposure and the harm).

Such an order is justified here. Although the case involves only a single plaintiff against a sole defendant, the scientific evidence is complex. As set forth above, given the scarcity of scientific literature that Viagra® can cause NAION, plaintiff should be "put to the test of proving their cause of action" before this Court and Pfizer are forced to waste considerable time and resources on unnecessary discovery efforts. *Lone Pine Corp.*, 1986 WL 637507 at *4.

B. Trial Court Has Power to Stay Discovery on Non-Essential Issues Pending the Determination of a Threshold Matter

Courts have long recognized that "[w]hen a particular issue may be dispositive, the court may stay discovery concerning other issues until the critical issue is resolved." *Vivid Techs., Inc. v. American Science & Eng., Inc.*, 200 F.3d 795, 804 (Fed. Cir. 1999). *See also* Wright & Miller, *Federal Practice & Procedure* §2040 (2005) (recognizing "principle of judicial parsimony" by which "when one issue may be determinative of a case, the court has discretion to stay discovery on other issues until the critical issue has been decided"). Indeed, courts have recognized that such an approach is "an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources." *Coastal States Gas Corp. v. Dep't of Energy*, 84 F.R.D. 278, 282 (D. Del. 1979). *See also Chavous v. Dist. of Columbia Fin. Responsibility & Mgmt. Assistance Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001) (stay of discovery is "appropriate exercise of the court's discretion" during pendency of parties' motions to dismiss and for summary judgment where such motions would be "thoroughly dispositive"). Thus, in *Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976), the Fifth Circuit Court affirmed the trial court's decision that "limited discovery to the matters raised by defendants' motion for summary judgment." Affirming the lower court's decision to curtail plaintiff's "extensive discovery program," the *Scroggins* Court stated:

> We have constantly emphasized the broad discretion which a district judge may properly exercise in discovery matters. On these facts, we see no possible abuse of discretion in the order staying general discovery until the court could determine whether the case would be resolved at the summary judgment stage.

Id. (citations omitted); *see Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1560 (11th Cir. 1985) (noting court's "broad discretion to stay discovery pending decision on a dispositive

motion" and recognizing, as in *Scroggins*, that a stay of "discovery as to all issues except that of . . . the only issue relevant to summary judgment" was not an abuse of discretion); *Nankivil v. Lockheed Martin Corp.*, 216 F.R.D. 689, 692 (M.D. Fla. 2003) ("courts have held good cause to stay discovery exists wherein 'resolution of a preliminary motion may dispose of the entire action.'").

Given the potentially dispositive nature of Pfizer's forthcoming *Daubert* motion, allowing discovery on all fact issues to proceed at this time—before the critical and threshold issue of general causation can be determined—would enmesh the parties and this Court in discovery issues concerning conceivably irrelevant documents. Considering such documents may never become necessary given Pfizer's potentially dispositive *Daubert* motion, such involvement would be a "wasteful and inefficient" use of judicial resources. *See Coastal States Gas Corp.*, 84 F.R.D. at 282. Thus, "[i]t is within the discretion of the court to postpone discovery of issues pending resolution of a potentially dispositive motion, if such a procedure will prevent the waste of time and effort of all concerned and will make more efficient use of judicial resources." *Britamco Underwriters, Inc. v. B & D Milmont Inn, Inc.*, No. 95-6039, 1996 WL 476624 at *1 (E.D. Pa. Aug. 16, 1996) (denying motion to compel production of "voluminous" documents related to counterclaim where "the granting of the motion for summary judgment [to be filed] will most likely render all of these issues moot"). *See also Marrese v. American Acad. of Orthopaedic Surgeons*, 706 F.2d 1488, 1494 (7th Cir. 1983) (where there is "a significant chance that the plaintiffs' case will fail regardless of what the internal files they are seeking may show," other discovery relevant to a summary judgment motion should be conducted first); *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981) ("district court may limit

discovery 'for good cause' . . . when it is convinced that the plaintiff will be unable to state a claim for relief").

The case of *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 133 F.R.D. 41 (D. Nev. 1990), is instructive. Plaintiff brought an antitrust action against ARCO based on its pricing practices in Las Vegas. Plaintiff sought extensive discovery from ARCO regarding "virtually all aspects" of its business. ARCO sought to limit initial discovery efforts to the question of whether entry barriers existed to the relevant market, an essential element to be established if plaintiff were to prevail on its claims. The court granted ARCO's motion and bifurcated discovery. Such an approach, the court recognized, "includes adequate safeguards to protect the rights of both [parties] while greatly streamlining and potentially reducing [the] cost of the litigation." *Id.* at 45. By permitting discovery only as to the limited threshold issue, "[b]urdensome discovery will be eliminated for those cases in which plaintiffs would have no chance of ultimately prevailing." *Id.*

This same reasoning applies here. Plaintiff cannot dispute that general causation —*i.e.*, whether Viagra® is capable of causing NAION—is an essential element of his claim. Absent evidence sufficient to establish such a causal relationship between Viagra® and NAION, plaintiff cannot recover no matter what other discovery may show. As shown above, discovery relevant to the general causation issue has already been conducted as Pfizer has produced hundreds of thousands of pages in the New York and pending New Jersey actions documenting all of its scientific studies on Viagra®.[1] If plaintiff cannot establish the admissibility of his expert's

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[1] To the extent plaintiff believes additional discovery of Pfizer is necessary on the issue of general causation, such discovery is already being defined and proceeding in the New Jersey action. For this Court to duplicate that inquiry would be a waste of judicial resources.

opinion based on the existing body of scientific information—information from the documents produced by Pfizer as well as the extensive published medical literature on Viagra®—there is "a significant chance that the plaintiff['s] case will fail regardless of what the internal files [of Pfizer] they are seeking may show." *Marrese*, 706 F.2d at 1494. Should that be the case, "burdensome discovery will be eliminated" because plaintiff "would have no chance of ultimately prevailing." *Rebel Oil*, 133 F.R.D. at 45.

C. Plaintiff Will Not Be Prejudiced by the Stay of Further Fact Discovery

Should Pfizer not prevail on its ultimate *Daubert* challenge to plaintiff's expert, plaintiff would then be able to continue his pursuit of discovery from Pfizer. During the pendency of the proposed expert discovery, Pfizer will continue to preserve all of its Viagra®-related documents, including electronic files, so that potentially responsive documents will not be lost as a result of the delay. *Chavous*, 201 F.R.D. at 4 (stay of discovery entered where plaintiff would not be harmed by a stay of discovery pending determination of dispositive motions). *See also Maljack Prods., Inc. v. Motion Picture Ass'n of Am.*, Civ. A. No. 90-1121, 1990 WL 157900 at *1 (D.D.C. Oct. 3, 1990) ("avoidance of potentially unnecessary discovery is warranted" where a motion to dismiss is pending and plaintiff would not be prejudiced by a stay of discovery pending determination of the motion to dismiss).

III. Conclusion

For all the reasons set forth above, Pfizer's motion, pursuant to Federal Rule of Civil Procedure 26, to bifurcate pretrial discovery and order early disclosure of expert reports while staying further fact discovery pending resolution of the threshold issue of general causation,

should be granted.

/s/ Edward W. Gerecke
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CERTIFICATE OF CONFERRAL UNDER L.R. 3.01(g)

The undersigned certifies he consulted with one of plaintiff's counsel, Christopher Nichols, who does not agree with the relief sought in this motion.

/s/ Edward W. Gerecke
Edward W. Gerecke

CERTIFICATE OF SERVICE

I CERTIFY that on June 28, 2005, I electronically filed the foregoing with the clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by mail to the following non-CM/ECF participants: Rainey Booth,

331 East Romana Street, Pensacola, Florida 32502, and Zoe B. Littlepage and Christopher Nichols, 408 Westheimer Street, Houston, Texas 77006.

/s/ Edward W. Gerecke
Attorney